

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

IN THE MATTER OF THE MATTER OF THE APPLICATION OF BULLDOG COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8153-M1	AQB 21-31
JAYHAWK COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8152-M1	AQB 21-32
LONGHORN COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8349-M2	AQB 21-33
COWBOY CDP (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7877-M1	AQB 21-34
WILDCAT COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7474-M2	AQB 21-35
ZIA HILLS CENTRAL FACILITY (CONOCOPHILLIPS) FOR AN AIR QUALITY PERMIT, NO. 7746-M8	AQB 21-36
WILLOW LAKE GAS PLANT (CRESTWOOD, NEW MEXICO) FOR AN AIR QUALITY PERMIT, NO. 5142-M8	AQB 21-38
MAVERICK COMPRESSOR STATION (XTO) FOR AN AIR QUALITY PERMIT, NO. 7565-M2	AQB 21-39
SPARTAN COMPRESSOR STATION (XTO) FOR AN AIR QUALITY PERMIT, NO. 7681-M2	AQB 21-40
TIGER COMPRESSOR STATION (XTO) FOR AN AIR QUALITY PERMIT, NO. 7623-M2 PETITIONERS.	AQB 21-41

WILDEARTH GUARDIANS' BRIEF RE
WHETHER THE PUBLIC HEARING MAY BE HELD VIRTUALLY

I. INTRODUCTION

At the direction of the hearing officer appointed in this matter, WildEarth Guardians (Guardians) responds to the hearing officer's question: whether the public hearing in these cases may be held virtually. Guardians concludes that the public hearing may be held virtually for two reasons. First, the relevant rules in the New Mexico Administrative Code do not prescribe a particular format (virtual, in-person, hybrid) in which hearings must be held, and because the New Mexico Environment Department (Environment Department or NMED) can make accommodations to ensure an adequate opportunity for the parties and the public in a virtual proceeding. Second, a virtual hearing would limit potential exposure to COVID-19 and expand the opportunity for public participation for immunocompromised and unvaccinated people. Because holding a virtual hearing in this case complies with the law and is appropriate in light of the resurgence of COVID-19, Guardians supports and would agree to a virtual hearing.

To answer the hearing officer's question, Guardians begins by examining the text of the rules governing the adjudication of New Source Review construction permits before the Environment Department and the balancing test courts use to determine whether administrative agencies have adequately provided due process. After concluding that holding a virtual hearing in these cases complies with the law and the balancing test, Guardians explains that the current state of the public health emergency in New Mexico due to COVID-19 further compels the use of a virtual hearing in this case.

II. DISCUSSION

a. Interpretation of Administrative Regulations in New Mexico

The New Mexico State Courts view statutory interpretation as an issue of law, rather than a question of fact. *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 128 N.M. 309, 312 (1999). When interpreting a particular statute, “a reviewing court’s central concern is to determine and give effect to the intent of the legislature.” *Id.* at 313. By contrast, a reviewing court will generally defer to an agency’s reasonable interpretation of its own ambiguous regulations, especially where the subject of the regulation implicates agency expertise. *Alb. Bernalillo Co. Water Utility v. NMPRC*, 148 N.M. 21, 39 (citing *In re Rhino Env’tl. Servs.*, 138 N.M. 133 and *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm’n*, 133 N.M. 97). The canons of statutory construction guide a reviewing court’s interpretation of administrative regulations. *Id.* The New Mexico Supreme Court has laid out canons of statutory interpretation to guide courts in determining legislative intent:

The plain language of the statute is the primary indicator of legislative intent. Courts are to give the words used in the statute their ordinary meaning unless the legislature indicates a different intent. The court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written.

Pub. Serv. Co. of N.M., 128 N.M. at 313.

b. Textual Reading of Relevant NMAC Sections Support the Appropriateness of a Virtual Permit Hearing

Two separate chapters of Title 20 of New Mexico’s Administrative Code govern the procedures for public hearings over New Source Review (NSR) construction permits before the Environment Department. Chapter 1, Part 4 provides the hearing procedures for a variety of permit types, including NSR construction permits, that are adjudicated before the Environment

Department. 20.1.4 NMAC *et seq.* Whereas, Chapter 2, Part 72 provides the public notice and participation procedures specifically for NSR construction permits. 20.2.72.206 NMAC.

Importantly, the New Mexico Environmental Improvement Board (EIB) promulgated the rules in Chapter 2, Part 72, 20.2.72.1 NMAC, while the Environment Department promulgated the rules in Chapter 1, Part 4. 20.1.4.1 NMAC. This distinction is significant because although the rules in Chapter 1, Part 4 apply to NSR construction permits, they do so only to the extent the rules are consistent with the rules promulgated by the EIB. 20.1.4.2 NMAC (“This Part sets forth procedural regulations for public hearings before the Environment Department involving permit issuance, renewal, denial, or modification...except to the extent any provision of this Part is inconsistent with any rule promulgated by the Environmental Improvement Board or the Water Quality Control Commission.”). This caveat has bearing on which set of rules govern the location of public hearings for NSR construction permits.

Chapter 1, Part 4 explains that unless otherwise provided by law, “the hearing shall be in Santa Fe or at a place in the area affected by the facility which is the subject of the proceeding.” 20.1.4.200.C.(4) NMAC. This rule contrasts with Chapter 2, Part 72, which states, “Public hearings shall be held in the geographic area likely to be impacted by the source.” 20.2.72.206.C. NMAC. Although Chapter 1, Part 4 allows the Environment Department to hold a hearing in Santa Fe *or* at a place in the area affected by the facility subject to the proceeding, that provision is inconsistent with Chapter 2, Part 72, which requires the Environment Department to hold the hearing specifically in the geographic area likely to be impacted by the source. Because the Environment Department’s rule at 20.1.4.200.C.(4) NMAC is inconsistent with the EIB’s rule at 20.2.72.206.C. NMAC, questions regarding whether a public hearing may be held virtually must be answered according to the EIB’s rule. *See* 20.1.4.2 NMAC.

At first glance, Section 206 of Chapter 2, Part 72 could be read to prohibit a virtual hearing, but a closer reading suggests Section 206 is simply silent on the matter of virtual hearings. Section 206 states that public hearings shall *be held* in the geographic area likely to be impacted by the source, but nothing in the rule defines or prescribes how a public hearing must “be held.” The EIB promulgated this rule in 2001, at a time when virtual hearings were not widely available or necessary, so one could assume the EIB promulgated the rule with the understanding that public hearings on construction permits would be held in-person, in the location impacted by a source. But the plain language of the rule alone does not explicitly require hearings be held in-person. What is explicit in Chapter 2, Part 72 is the overall intent of the procedural rules for hearings, which is to ensure the public has an opportunity to participate in the proceeding and specifically members of the public in the area likely to be impacted by the source of pollution. *See generally* 20.2.72.206 NMAC. By that standard, whether a hearing is held in-person or virtually arguably matters less than whether the format of the hearing adequately provides members of the public affected by the source of pollution an opportunity to participate in the process. A virtual hearing format would adequately provide the public, including members of the public in the geographic area likely to be impacted by the source of pollution, an opportunity to participate in the proceeding, especially if accommodations were made to facilitate public participation by those without internet access. Although accommodations for members of the public without internet access are not explicitly required by the rules, the Environment Department could further ensure adequate due process by, for example, reserving a public venue in the geographic area likely to be impacted by the source of pollution, where the virtual hearing could be streamed and those without internet access could observe and participate in the hearing.

Ensuring the public can adequately participate in hearings is fundamentally about due process, and in the administrative context due process is flexible in nature and responsive to the circumstances of a given situation, as a whole. *Alb. Bernalillo Co. Water Utility Authority v. NMPRC*, 2010-NMSC-013, ¶ 28, 148 N.M. 21, 34. To determine what process is due, courts balance three factors: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the [g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Using this framework to assess, in this case, whether a virtual hearing would provide the process due, the private interest to be heard and participate in a virtual hearing would be substantially the same as a hearing held in person; the risk of improperly limiting the opportunity to participate in the proceeding would be minimal because participation could effectively occur wherever internet access is available; and, as will be discussed further below, a virtual hearing would support the government’s interest in limiting the spread of the coronavirus and ensuring public safety in the midst of the global pandemic.

c. Circumstantial Considerations Support a Virtual Hearing

Considering this proceeding as a whole, the current state of emergency in New Mexico due to COVID-19 and the increasing spread of the Delta variant is a relevant factor in determining whether a virtual hearing would be appropriate in this case. Since March 11, 2020, the State of New Mexico has been in a state of public health emergency to minimize the adverse effects of COVID-19. N.M. Exec. Order No. 2021-044 (Jul. 23, 2021). Although fully vaccinated people may participate in many of the activities they did before the pandemic,

according to the Centers for Disease Control and Prevention (CDC), the rate of vaccination remains below the 60% target in many New Mexico counties including Chaves County, which has only fully vaccinated 42% of the population as of filing of this brief. *See* New Mexico Dept. of Health, COVID-19 Public Dashboard, <https://cvprovider.nmhealth.org/public-dashboard.html> (last accessed Jul. 31, 2021). In addition, due, in part, to the higher transmissibility of the Delta variant, infection rates in New Mexico quadrupled in July, and health experts warn infections and hospitalizations may continue to rise this fall and winter. Algernon D’Ammassa, *Gov. Lujan Grisham to state employees: Get vaccinated for COVID-19 or be tested every 2 weeks*, Las Cruces Sun-News (Jul. 29, 2021); *see also* Ken Terry, *What Experts Predict From COVID This Fall and Winter*, WebMD Health News (May 20, 2021). In response to increasing infections, Governor Michelle Lujan Grisham recently issued an executive order directing state employees to get vaccinated or begin providing a negative COVID test every two weeks. N.M Exec. Or. 2021-045 (Jul. 29, 2021). Similarly, the CDC recently updated its COVID guidance and now recommends that even vaccinated people wear masks indoors if they are in areas of substantial or high transmission. Centers for Disease Control and Prevention, *Interim Public Health Recommendations for Fully Vaccinated People*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (Updated July 28, 2021).

The risks to public health posed by COVID-19 and the State of New Mexico’s public interest in minimizing the transmission and adverse impacts of the disease support a virtual hearing in this case. Moreover, a virtual hearing would ensure immunocompromised and unvaccinated members of the public have an opportunity to safely observe and participate in the proceeding.

III. CONCLUSION

The rules governing public hearings on NSR construction permits before the Environment Department require the hearing to be held in the geographic area likely to be impacted by the source of pollution, but these rules do not prescribe the particular format in which the hearing is to be held – whether it must be in-person or whether a virtual format is permissible. As discussed above, the plain language of the rules can be read to allow the hearing in these cases to be held virtually. Furthermore, a virtual hearing in this case does not violate procedural due process rights because it adequately ensures the parties’ and public’s opportunity to observe and participate in the proceeding. Finally, considering the circumstances of the proceeding as a whole, including the state of the pandemic in New Mexico, a virtual hearing would minimize public exposure to COVID-19 and provide a safer opportunity for immunocompromised and unvaccinated people to participate in the proceeding, further satisfying the balancing test courts use to determine administrative due process rights.

Guardians supports holding a virtual hearing in this case. If there are concerns about members of the public lacking internet access, one option would be for the Environment Department to reserve a physical space in the geographic area likely to be impacted by the source of pollution, where the virtual hearing could be presented and members of the public without internet access could participate in the hearing. Providing this accommodation is not explicitly required under the rules, but it would further ensure the Environment Department’s compliance with 20.2.72 NMAC and due process obligations.

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of **WildEarth Guardians' Brief RE Whether the Public Hearing May Be Held Virtually** was served on August 2, 2021 via email to the persons listed below:

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